JOHN CORNYN

December 21, 2000

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2000-4817

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142511.

The Texas Department of Insurance (the "department") received a request for information related to Comprehensive Health Services of Texas. You claim that the requested information is excepted from disclosure by sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.[1] You also contend that a portion of the responsive information is not subject to the disclosure requirements of the Public Information Act (the "Act"), pursuant to article 21.28 of the Texas Insurance Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your claim that the Act does not apply to a portion of the requested information. You explain that some of the requested information consists of records of a receivership estate created in accordance with article 21.28 of the Texas Insurance Code. Section 11 of that article provides in pertinent part as follows:

> (f) Open Records. Chapter 552, Government Code, *shall not apply to any records* of a receivership estate, or to the records of an insurance company prior to its receivership, held by the receiver or by a special deputy under this Article.

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[1]You have also requested a finding that this opinion may be relied upon as a previous determination under Government Code section 552.301(a). We decline to issue such a finding at this time.

(emphasis added). *See also* Open Records Decision No. 610 (1992) (insurer's books and records held by receiver appointed pursuant to article 21.28 of the Insurance Code are records of the judiciary and, as such, are excepted from provisions of the Open Records Act). After reviewing the submitted information, we agree that the Act is not applicable to the information which you have identified as subject to article 21.28 of the Insurance Code. Therefore, you have no obligations under the Act to disclose this requested information.

In addition to the information which you have established as subject to article 21.28 of the Insurance Code, you have submitted attorney notes, which you claim are excepted from disclosure as attorney work product under section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* You represent that the subject notes were created by an attorney in anticipation of the litigation which initiated the subject receivership. Based on your representations and our review of the submitted information, we find that this information reveals the attorney's mental processes, conclusions, and legal theories. We therefore conclude that these notes may be withheld as attorney work product under section 552.111 of the Government Code.

As the above discussion resolves this request, we do not address your further arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).
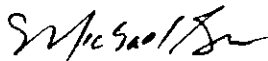
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

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Sincerely,

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 142511

Encl: Submitted documents

cc: Ms. Liz V. Pasternak
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